In the Matter of Michael Larino, City of Bayonne
DOP Docket No. 2006-4481
(Merit System Board, decided June 21, 2006)

Michael Larino, a Fire Fighter with the City of Bayonne, represented by Craig S. Gumpel, Esq., requests a hearing on his suspension.

As background in this matter, on February 23, 2006, the appellant was charged with conduct unbecoming a public employee and violation of Bayonne Fire Department rules and regulations pertaining to leaves of absence. Specifically, the appointing authority charged the appellant with failing to report for duty after leaves of absence or off-tour periods had expired. Initially, in a memorandum dated February 27, 2006, the appellant requested a hearing on the charges brought against him. However, the following statement appears under his signature on the memorandum: "I do not wish to fight these charges." In a memorandum dated March 9, 2006, the appointing authority informed the appellant that he would be suspended for five working days from March 15 through 31, 2006 and that he would return to work on April 4, 2006.

In support of his contention that he is entitled to a hearing on his suspension, the appellant asserts that a five working day suspension amounts to a suspension of 120 hours. He explains that the Fire Department operates on a schedule consisting of 24 hours on duty followed by 72 hours off duty, and then the cycle repeats itself. The appellant contends he has served a suspension of five 24-hour days totaling 120 hours and that this constitutes major discipline under Merit System law and rules.

In response, the appointing authority, represented by Arthur R. Thibault, Jr., Esq., asserts that the appellant pled guilty to the charges against him, therefore dispensing with the need for a hearing. Additionally, the appointing authority asserts that the appellant's appeal of his suspension is untimely in that he received notice of his five-day suspension on March 9, 2006 and did not file an appeal with the Merit System Board (Board) until March 30, 2006. Accordingly, the appellant was beyond the 20-day time period for filing an appeal with the Board. Alternatively, the appointing authority argues that if the Board determines that an appeal is appropriate, it must be limited to the appropriateness of the penalty since the appellant pled guilty to the underlying charges.

CONCLUSION

In this matter, the threshold issue before the Board is whether the five working-day penalty for the appellant's violation of the appointing authority's leave policy is a major or a minor discipline and the consequences that follow from such determination. *N.J.S.A.* 11A:2-15 and *N.J.A.C.* 4A:2-2.9 provide for appeal rights to the Merit System Board when the penalty imposed is major discipline. *N.J.S.A.* 11A:2-16 provides for appeals of minor discipline, but only of employees in State service. County or municipal employees may pursue minor disciplinary action under standards and procedures established by the appointing authority or through a negotiated collective bargaining agreement or by seeking relief through the Law Division of the New Jersey Superior Court. *See Romanowski v. Brick Township*, 185 *N.J. Super*. 197 (App. Div. 1982).

Based on the facts presented, the Board finds that the appellant received a major discipline. Specifically, the Board addressed this particular matter in *In the Matter of William Brennan* (MSB, decided July 7, 1998). In *Brennan*, the Board determined that a five-day standard has been interpreted to refer to five working days of not more than 40 hours of pay. Additionally, the Board emphasizes that the appointing authority must follow the procedures set forth *N.J.A.C.* 4A:2-2.5[1] when imposing such a major discipline in the future.

Further, in this matter, since the appointing authority did not issue a Final Notice of Disciplinary Action (FNDA), the Board must consider whether the appellant filed his appeal with the Board in a timely manner. A positive determination entitles the appellant to a hearing at the Office of Administrative Law. In this regard, the Board finds that the appellant has timely appealed his suspension to the Board. *N.J.A.C.* 4A:2-2.8 provides that when an appointing authority fails to give the employee an FNDA, the employee may appeal directly to the Board within a reasonable time.[2] As noted previously, the appellant was not served with an FNDA. He was notified that he was being suspended for five days on March 9, 2006 and filed his appeal with the Board 21 days later, on March 30, 2006. Finally, the Board takes no position regarding the appointing authority's contention that

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[1] This rule requires, *inter alia*, that an employee be served with a PNDA setting forth the charges and specifications and afforded the opportunity for a hearing prior to the imposition of major discipline, except in those instances where an appointing authority determines that an employee is unfit for duty or is a hazard to any person if permitted to remain on the job or that it is necessary to maintain safety, health, order or the effective direction of public services. In those instances, an employee may be immediately suspended, but a PNDA with an opportunity for a hearing must be served within five days of the immediate suspension.

[2] When an FNDA is issued, an employee has 20 days from receipt of the FNDA to timely file an appeal with the Board.

the hearing should only pertain to the potential penalty since the appellant "pled guilty" to the charges. Any such contention is best addressed at the Office of Administrative Law, although the Board emphasizes that such a hearing is *de novo*, and matters sustained at the departmental level are not considered determinative.

ORDER

Therefore, the appellant's request for a hearing is granted. Further, it is ordered that this matter be referred to the Office of Administrative Law for a hearing.